

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

**BIENVENIDO FRANCO, Individually and on)
Behalf of All Others Similarly Situated,)**

Plaintiffs,)

Civ. No.: 07 CV 3956
(JS/AKT)

V.

**IDEAL MORTGAGE BANKERS, LTD. d/b/a)
LEND AMERICA, INC., MICHAEL ASHLEY,)
TIMOTHY MAYETTE, HELENE DECILLIS,)
MICHAEL PRIMEAU,)**

Defendants.)

PLAINTIFFS' MOTION IN LIMINE NO. 3

Plaintiffs respectfully move this Honorable Court to exclude the following evidence.

Plaintiffs move to exclude any evidence, arguments or instruction concerning affirmative defenses not raised by Defendants. Generally, if a party fails to raise an affirmative defense in its pre-trial order, the party waives its right to assert the issue at trial. *E.g., Lutnick v. New York City Health & Hospitals Corp.*, 1994 WL 704804, at *2 (S.D.N.Y. Dec. 16, 1994). For example, while Defendant Ashley has pled that Plaintiffs are purportedly “exempt” from the requirements of the FLSA (*See* D.E. 156 at 5), he has failed to identify any specific exemption. As stated by one court, “[t]he argument an employer need only plead that its employees are exempt from the FLSA's overtime provisions to preserve all conceivable exemptions is contrary to the pleading standards announced by the Supreme Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, which deem ‘formulaic’ or ‘[t]hreadbare’ recitals of the elements of a claim inadequate

under Rule 8 of the Federal Rules of Civil Procedure.” *Ahle v. Veracity Research Co.*,
738 F.Supp.2d 896, 923 (D.Minn. Aug . 25, 2010) (citations omitted).

Dated: July 15, 2013

Respectfully Submitted,

/s/ James B. Zouras

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PLAINTIFFS' MOTION IN LIMINE NO. 3** was served upon the following parties via this Court's ECF filing system, this 15th day of July, 2013:

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And, electronically mailed the above mentioned on this 15th day of July, 2013 to the following address:

Helene DeCillis
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/s/ James B. Zouras
James B. Zouras